plaintiff. According to the plaintiff and this was not disputed, the due date for completion of all constructions was on or before 18 February 1983. I would accept this piece of evidence. From this date up to the date of the rescission letter dated 27 December 1984, there is a lapse of 23 months. Therefore the amount computed on the basis of clause 1(i) aforesaid would be RM69,000. I would accept this amount prayed for by the plaintiff.

As regards the claim of RM4,920 for loss of rental, there is merely the evidence of the plaintiff that he rented out his house to a tenant for RM410 per month. No receipt had been produced nor was the tenant called to give evidence on this score. Notwithstanding the non-denial by the defendant on this matter, it is still incumbent on the plaintiff to establish the claim strictly as it is in the nature of special damages. I do not think he had done so. Furthermore, there is nothing in the agreements providing for such a claim. In the circumstances, I will disallow this claim completely.

I come to the last claim for RM44,000 relating to the loss in value of the wooden house belonging to the plaintiff before it was dismantled. Since there is nothing in the agreements allowing for such a claim, I do not think it appropriate to grant it. However, clause 3(5) of the development agreement seems to indicate that the defendant should bear the costs and expenses of dismantling the plaintiff's house but in this case, the house was actually dismantled by the plaintiff for which he incurred the sum of RM2,000. The plaintiff was able to sell the salvaged materials from the house for the sum of RM6,000. The defendant has maintained that he had paid the plaintiff the sum of RM1,300 for expenses incurred in dismantling the house. I am prepared to accept this. In the circumstances, the balance owing to the plaintiff is RM700. I will therefore allow this amount of RM700 to the plaintiff.

In summary therefore the total amount to be entered for the plaintiff is RM69,000 + RM700 = RM69,700 with interest at the rate of 8% per annum from the date of judgment until date of realisation. Costs to be taxed.

MEDFICHE SDN. BHD.

v.

PERSATUAN TEKNOLOGI MALAYSIA

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
CIVIL SUIT NO. 12-25-92
[3 DECEMBER 1992]

APPEAL: Appeal against the decision of the Sessions Court Judge dismissing the defendant's application to set aside the plaintiff's writ of distress before the auction date.

LANDLORD AND TENANT: Plaintiff claimed for vacant possession and double rental under s. 28(4)(a) of the Civil Law Act 1956 - Tenant holding over - Distress suit filed - Whether s. 5(1) of the Distress Act allows only single rental to be distrained for.

The plaintiff had instituted a civil suit [C.S.No 22-446 of 1992] against the defendant for vacant possession from 1 April 1991 and for double rental thereafter. The defendant continued to hold over without paying any rent whatsoever and the plaintiff then filed Distress Suit S54-24-91 and obtained a writ on 13 February 1992. The defendant applied to set aside the writ before the Sessions Court and failed. In the appeal to the Judge, the defendant contended that only single rental could be distrained for under s. 5(1) of the Distress Act and that double rental was in fact damages which were in the Court's discretion. The plaintiff argued that when rent was in fact due from a tenant, a claim in distress over the amount that was lawfully due does not vitiate the distress. The goods seized by the bailiff were valued at less than RM1,000.

Held:

[1] Rental was in fact due to the plaintiff from May 1991 to December 1991 and right up to the date of the decision on 29 May 1992, totalling up to RM21,000. The defendant's submission amounts to him stating that the plaintiff was claiming more than what was lawfully due to him. However, since the defendant did not even tender the amount which according to him was lawfully due, he is estopped from contending that the distress was illegal. An amount over claimed does not vitiate a distress. The tenant must seek relief in damages or rescue for any amount alleged over claimed.

[2] A claim for double rent in Malaysia is recoverable by distress up to the time the tenant quits by virtue of the statutory option given to the landlord by s. 28(4)(a) of the Civil Law Act 1956.

[3] The validity of the Notice to Quit was not disputed by the defendant.

[Appeal dismissed with costs].

Cases referred to:
*Krishna Sreedhare Panicka v. Chiam Soh Young Realty Co. Ltd. [1983] 1 MLJ 65 (**cit**)*
*Tancred and Armitage v. Leyland [1851] 16 QB 667 (**cit**)*

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)
Civil Law Act, s. 16(4) (Singapore)
Distress Act 1951, s. 5(1)
Distress for Rent Act 1737, s. 18 (UK)
Rent Act 1968 (UK)

Other sources referred to:
Halsbury's Laws of England, Vol. 13, 4th Edn., para 287, 368
Landlord and Tenant, Lye Lin Heng [1990] at p. 209

For the plaintiff - G.M. Lian; M/s. Bahamin, Chan & Lian
For the defendant - Max Yong; M/s. Chan & Kiru

JUDGMENT

Mahadev Shankar J:
The history of this matter is contained in the judgment in Civil Suit 22-446 of 1992 between the same parties.

Suffice it to say here that after the plaintiff instituted their civil suit for vacant possession with effect from 1 April 1991 and double rent from that date, the defendant continued to hold over. The grounds on which this was done were first made known in a defence and counterclaim filed on 20 June 1991. The defendant claimed for the reasons stated therein, that it was still a lawful tenant of the premises. However no rent whatsoever was paid under protest or at all.

On 20 December 1991 the plaintiff having opted to charge the defendant double rent as per section 28(4)(a) of the Civil Law Act 1956 filed this Distress Suit S.54-24-91 and obtained a writ on 13 February 1992. The Bailiff then moved in and took possession. Before the auction the defendant applied to set aside the writ. The Sessions Judge dismissed the application on 29 May 1992.

This appeal is against that dismissal. The submission is that under s. 5(1) of the Distress Act only single rental can be distrained for. On the strength of *Krishna Sreedhare Panicka v. Chiam Soh Young Realty Co. Ltd.* [1983] 1 MLJ 65 it was submitted that double rent was not rent but damages which were in the Court's discretion and therefore at large. Vol. 13 of Halsbury's Laws of England, 4th Edn., para 368 was cited as to the circumstances in which distress is illegal. There is nothing in that paragraph specifically referring to distress for double rental. Paragraph 287 of the same volume was also cited. The caption here reads "When double rent may be distrained for" and the paragraph continues as follows:

> There is one instance in which the law allows the landlord to distrain for double rent, and that is when the tenant gives notice of his intention to quit the premises at a particular time, and does not deliver up possession accordingly; he then becomes liable to pay the landlord double the former rent for the whole time he holds the premises after the expiration of such notice. Distress for Rent Act 1737, s. 18. As to the application of this section in the case of tenancy protected by the Rent Act 1968; See Landlord and Tenant. Such double rent may be levied and recovered as the former single rent might have been. This provision only applies where the tenant has given a notice binding upon him to quit at the expiration of the term specified in the notice and upon which the landlord might at that time act and bring an action for recovery of the land.

The submission for the plaintiff was that if rent was due the landlord could distrain. *Tancred and Armitage v. Leyland* [1851] 16 QB 667, was relied upon to show that if rent was in fact due, a claim in the distress for more than what was lawfully due, did not vitiate the distress. The Auctioneer had estimated the value of the goods seized at less than RM1,000. Plaintiff's relied upon a passage in Landlord and Tenant by Lye Lin Heng Butterworth [1990] at p. 209 which reads:

> It should be noted that a claim for double value cannot be distrained for (as it is not rent) and there is no relief in equity. However, a claim for double rent is recoverable either by **action or by distress,** up to the time that the tenant quits.

At the time when the defendant's application was heard in May 1992 it was not open for the defendant to say that rent was not due. It was from May to December 1991 (6 x 1750 = RM10,500).

It continued unpaid till the date of the decision on 29 May 1992 (now RM21,000). The defendant did not tender the rent lawfully due on the basis of his own contention. I hold he is therefore estopped from contending that this distress was illegal. The submission made on his behalf is just another way of saying that the landlord is claiming for more than was lawfully due. That does not vitiate the distress. The tenant's remedy is in damages or rescue only if the landlord has in fact distrained for more than is due.

The second reason why this appeal fails is that it is my view, that a claim for double rent in Malaysia is recoverable by distress up to the time the tenant quits. Lye Lin Heng's statement is good law in Malaysia by reason of the statutory option given to the landlord by s. 28(4)(a) of our Civil Law Act 1956 which is in *pari materia* with s. 16(4) of the Civil Law Act in Singapore.

In the distress suit by an affidavit dated 22 January 1992 (Enclosure 5) the plaintiff exhibited the Notice to Quit dated 28 December 1991 to support their claim that the tenancy had determined on 31 March 1992. John de Silva filed an affidavit in reply affirmed on 24 February 1992 (Enc. 11) - Nowhere in this affidavit does he challenge the validity of the Notice to Quit, effectively or at all. He merely exhibited the pleadings in the civil suit in which, be it recollected the receipt of the Notice was admitted, and chose to rely upon a legal argument that distraining for double rent was not permissible in law.

It is the opinion of this Court that if double rent is due it can be distrained for. To hold otherwise would result in an anomalous position where a tenant can avoid distress by terminating his tenancy and then contending as has been done in this case, that until a judgment is obtained in an action at some uncertain date in future, he need not pay any rent at all.

This appeal is therefore dismissed with costs both here and in the Court below.

OVERSEAS-CHINESE BANKING CORPORATION LIMITED

v.

BANHENLY HOLDINGS SDN. BHD. & 7 ORS.

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[SUIT NO. 22 (23)-51 OF 1989]
18 NOVEMBER 1991

PRACTICE AND PROCEDURE: Application for summary judgment - Overdraft facility granted to first defendant and guaranteed by the first five defendants - Allegation by the defendants contract with the plaintiff a sham, illegal and contrary to public policy - Conversion by first defendant into a bumiputera company soon after entering into the contract - Enjoyment of special bumiputra privileges - Whether there was any manipulation of Article 153 Federal Constitution - Plaintiff's solicitors involved in conversion transaction - Whether there exists collusion by the parties and contravention of public policy - Relevant facts held by plaintiff - Circumstances which ought to be investigated - Whether summary determination appropriate.

The plaintiff sued the defendants for a sum of RM1,131,462.33 granted by way of an overdraft facility to the first defendant and allegedly guaranteed by the first five defendants. The plaintiff's application for summary judgment was dismissed by the SAR and the Judge, in chambers as well as after hearing further arguments in open Court.

The main argument raised by the defendants was that soon after the contract, the first defendant, with the legal assistance and advice of plaintiff solicitors, purported to convert into a bumiputera company in order to enjoy the special privileges accorded to bumiputera companies. This made their contract with the plaintiff a sham, an illegality and a contravention of public policy, calling for reflection upon Article 153 of the Federal Constitution, which stipulates for the safeguarding of the special position of Malays. Further, there was also an attempt to defeat the policies to be followed by banking institutions laid down in the Central Bank of Malaya Ordinance 1958. The charge in favour of the plaintiff under the National Land Code was also alleged to be affected due to the transfer of shares from the first defendant to a bumiputera shareholder.